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No. 1027

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

EDWARD MALLINCKRODT, JR.,

Petitioner,

vs.

JOSEPH D. NUNAN, JR., COMMISSIONER OF INTERNAL REVENUE,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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EDWARD MALLINCKRODT, JR.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The petitioner, Edward Mallinckrodt, Jr., prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Eighth Circuit affirming a judgment of the Tax Court of the United States.

Opinions Below

The opinion of the Tax Court (including the concurring and dissenting opinions) (R. 82-119) is reported in 2 T. C.

1128. The opinion of the Circuit Court of Appeals (R. 355-364) is reported in 146 F. 2d 1.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 10, 1945 (R. 364). Petition for rehearing seasonably filed by petitioner (R. 365) was denied on January 29, 1945 (R. 373). The jurisdiction of this Court is invoked under Section 240, as amended, of the Judicial Code (28 U. S. C., Section 347).

Question Presented

A trust was established by a father in 1918 for the benefit of a son and others, with the son and a Trust Company as co-trustees. Until 1933 the income of the trust was used to pay off debts and burdens of a building enterprise as directed by the donor. In the period 1934 (—) 1937, inclusive, income became available which, under the terms of the trust, would have been paid to the son, as beneficiary, had he so requested of the other co-trustee. No such request was made in 1934 and 1935. In 1936 and in 1937 only a part of the trust income was paid to third parties at the request of the son and the undistributed income of the trust for each of the four years, pursuant to the express terms of the trust, became part of the principal of the trust estate, subject to the right of the son to dispose of it by will. The question is whether the income which the son could have received upon request, but which he did not request, was taxable to him as his income instead of to the trustees who actually reported the income as taxable to them and paid the tax thereon for each year.

Statutes Involved

The applicable provisions of the statutes involved are set out in the Appendix, *infra*, pp. 23-24.

Statement

Edward Mallinckrodt, Sr. (who died in 1928) on April 17, 1918, executed a trust instrument (R. 261), by which he transferred to St. Louis Union Trust Company and the petitioner, as trustees, property and securities under the terms and conditions stated in the instrument. At the time this trust was created, the grantor's family consisted of petitioner, petitioner's wife, and their three sons. The grantor's intention in creating the trust was primarily to provide for petitioner's children and grandchildren (R. 135-140). Petitioner had already received a large amount of property from his father.

By the terms of the trust instrument, the net income of the trust was to be devoted first to paying certain debts, obligations, and burdens growing out of a building enterprise (R. 267), and, after those obligations had been paid and satisfied in full, then: to pay out of the annual net income $10,000 per year to the wife of petitioner during their joint lives; to pay the residue of such annual trust income to petitioner during his life, upon his request; to accumulate the undistributed annual net income and, at the end of each year, to add it to the principal of the trust estate (R. 268-269). The trust instrument conferred upon petitioner a testamentary power of appointment over the corpus of the trust estate (R. 280), but provided that if he did not exercise the power, the trust should continue after his death for the benefit of his widow, his children, and the

descendants of his children, and, upon certain contingencies, for the benefit of others.

The trustees were empowered, upon the written request of petitioner, during his lifetime, but subject to the approval of both trustees, to "convey or pay to" him "such portions of the principal of the trust estate as it may seem wise to the Trustees to distribute to him for his benefit or that of his family; * * *." (R. 279). The trust was subject to termination during the lifetime of petitioner "at the discretion of the then Trustees, in case they shall decide that such earlier termination is advisable or desirable in the interest of said 'Arcade Building Enterprise', or for any other reason in the interest of the estate then held in trust or of the beneficiaries thereof." If the trust were terminated during the lifetime of petitioner, he was, by the terms of the trust instrument, to have all of the assets of the trust estate (R. 282). Petitioner was authorized to appoint, by will or by written instrument, his successor trustee, and, if no successor were named by him, the St. Louis Union Trust Company was to be the sole trustee (R. 281).

The debts, obligations, and burdens of the Arcade Building Enterprise referred to in the trust instrument were fully paid and satisfied out of the income of the trust estate by 1933 (R. 133-139).

In 1934 and thereafter, the trustees paid to petitioner's wife $10,000 each year out of the annual income of the trust (R. 256). The petitioner made no request that any of the income of the trust be paid to him in 1934 and 1935. In 1936, upon petitioner's request, of the trust income the trustees disbursed $15,000 to certain educational and charitable organizations, and $4,075.82 to a trust which petitioner had created for the benefit of his wife (R. 294). Petitioner reported in his income tax return for 1936 so much of the $15,000 distribution as was taxable (R. 131).

He did not report in his return the taxable portion of the $4,075.82 distribution. In 1937, the trustees distributed out of trust income, upon petitioner's request, $3,109.14 by transferring that amount to the trust which he had created for his wife's benefit (R. 131). The taxable portion of this distribution was not included in petitioner's income tax return for 1937. During each of the taxable years, petitioner's wife reported and paid the tax upon the $10,000 of trust income which was distributable to her and which she received from the trustees (R. 256). All of the undistributed net annual income of the trust for each of the years in question was reported by the trustees as income taxable to the trust, and they paid the tax due upon it (R. 132). At the end of each of the years, the trustees, as directed by the trust instrument, added the undistributed net income for that year to the corpus of the trust (R. 347).

Respondent determined that the undistributed trust income for each of the years was taxable to petitioner (R. 57-59, 62-64). The Tax Court sustained respondent's determination (R. 82-95), on the theory that the undistributed trust income was taxable to petitioner under Section 22(a). Five judges dissented (R. 114-119), on the theory that the undistributed trust income was taxable to the trust estate under Sections 161 and 162. The Circuit Court of Appeals affirmed (R. 364), on the theory that the undistributed trust income was taxable to petitioner under Section 22(a) and relied upon "implications" deducible from prior decisions.

Specifications of Error to Be Urged

The United States Circuit Court of Appeals for the Eighth Circuit erred:

1. In affirming the judgment of the Tax Court holding petitioner liable for tax upon the undistributed income of the trust estate not received by him.

2. In failing to hold that the entire undistributed income of the trust not received by petitioner was taxable to the trust estate under the provisions of Sections 161 and 162 of the Revenue Laws.

3. In emasculating the express, unambiguous, and specific provisions of Sections 161 and 162, and applying by implication, in their stead, the general provisions of Section 22(a), contrary to the principles of prior decisions of this Court.

4. In holding that the undistributed income of the trust estate not received by petitioner was taxable to him under the provisions of Section 22(a) of the Revenue Laws.

5. In failing to hold that the undistributed income from the trust estate, which was not "to be distributed currently by the fiduciary," was taxable to the trust estate and not to petitioner.

6. In misconstruing language used in earlier decisions of this Court, dealing with situations where no bona fide trust had been created and income was held taxable to the donor, to warrant taxation of a beneficiary, other than the donor, for trust income where a bona fide trust was created and the beneficiary had a power to acquire the income but did not exercise the power.

7. In resting its decision upon "implications" drawn from the opinions of this Court in *Corliss* v. *Bowers*, 281 U. S. 376, 378, and *Helvering* v. *Clifford*, 309 U. S. 331, which implications are completely hostile to the express provisions of Sections 161 and 162 of the Revenue Laws.

Reasons for Granting the Writ

In holding the beneficiary of a bona fide trust liable for tax on undistributed trust income which he never received

but which income was taxable to the trust estate under unambiguous statutes, the decision of the court below deals with a question of great and continuing importance in the construction and administration of Federal revenue laws. In effect, the decision below is a repeal by judicial interpretation of an unambiguous statutory scheme for taxation of trust income, and conflicts with principles applied in applicable decisions of this Court in the interpretation of the Federal tax statutes involved. The basic unsoundness of the decisions by the Tax Court and the Circuit Court of Appeals, attributable to their misconception of the meaning and effect of certain language employed by this Court (not involved or necessary to its decisions), is and will be a source of confusion to donors, beneficiaries, trustees, taxpayers, administrative officers, and all lower courts until clarified in the public interest.

1. Unambiguous statutory scheme for taxation of trust income should not be emasculated by judicial construction. —The decision of the court below relying on Section 22(a) is in disregard of and violates the plain language of Sections 161 and 162 of the Revenue Laws.

Special statutory provisions control as against the general law.—Sections 161 and 162 are statutes dealing *particularly* and *specially* with the taxation of *trusts*. Beginning with the Revenue Act of 1928, a separate subdivision headed "SUPPLEMENT E—ESTATES AND TRUSTS", has appeared in each Act, and every such subdivision has contained, in substance, Sections 161 and 162, *supra*. On the other hand, Section 22(a) is a *general* provision.

It is an old and familiar rule, repeated almost innumerable times by the Federal Courts, that where there is, in the same statute, a *particular* enactment, and also a *general* one, which in its most comprehensive sense would include the former, the *particular* enactment must be operative,

and the *general* enactment must be taken to affect only such cases within its general language as are not within the provisions of the *particular* enactment. *United States* v. *Chase,* 135 U. S. 255, 260; *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208; *MacEvoy Company* v. *United States,* 322 U. S. 102, 107; *Sanford* v. *Sanford,* 286 Fed. 777, 780; and *Townsend* v. *Little,* 109 U. S. 504, 512.

Statutory scheme for taxation of trusts.—Under the statutory scheme, a *trust* pays the tax upon its *whole* taxable income, *except* so far as particular *deductions* are authorized by the statute.

Section 161(a) lays down the rule that "the taxes imposed by this title upon *individuals* shall apply to the income of estates or *of any kind of property held in trust.*" (Emphasis supplied)

In other words, a *trust* is a taxable entity, and is to be taxed on *its* income as if it were an individual, except as otherwise provided by the *particular* provisions of Sections 161 and 162.

Under clauses (1), (2), and (4) of Section 161(a), the income of the trust includes (1) income accumulated for unborn or unascertained persons, or held for future distribution, (2) *income "which is to be distributed currently by the fiduciary to the beneficiaries,"* and (4) income which, in the discretion of the fiduciary, may either be distributed or accumulated.

By paragraph (b) of Section 161, the tax is to be computed upon the *net* income of the trust, and *shall be paid by the fiduciary* in all cases, *except* in the case of a *revocable* trust, or where the grantor retains a right to the benefit of the income of the trust created by him, which exceptions are provided for by Sections 166 and 167 of the Revenue Acts in question.

By the initial clause of Section 162 the net income of the trust must be computed in the same manner and upon the same basis as in the case of an individual, *except that*—

> "b. There shall be allowed as an additional deduction in computing the net income of the * * * trust the amount of the income of the * * * trust for its taxable year *which is to be distributed currently by the fiduciary to the beneficiaries,* * * * but the amount *so* allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not * * *." (Emphasis supplied.)

We submit that, under the provisions of Section 161(a), the income of the trust includes not only what is retained, but what is currently distributable, under the terms of the trust. In other words, under the statutory scheme, a trust pays upon its *whole* taxable income, *except* so far as particular deductions are authorized by the statute.

Deductions allowed to trusts.—The only statutory provision (peculiarly applicable to trusts) which authorizes a deduction from its income by a trust, on account of a distribution, or a duty of distribution, to beneficiaries, is contained in Section 162(b). That provision is the *crux* of this case. Only the amount of the income (for the taxable year) "*which is to be distributed currently by the fiduciary to the beneficiaries*" can be deducted. Unless the particular instance falls within that language, the trust must pay the whole tax, and there is no deduction. Since under the trust here in question the income not requested is directed by the trust instrument to be added to corpus, it is "income accumulated or held for future distribution under the terms of the will or trust," and is taxable to the trust, no deduction therefor being allowed by the statute.

Meaning of words "to be distributed currently" in Section 162(b).—Apart from the sum of $10,000 directed to be

paid annually to wife of petitioner out of the income of the trust, the trust income was *not "to be distributed currently by the fiduciary."* The Circuit Court of Appeals for the Eighth Circuit correctly so held. That Court said (R. 362):

> "We think that the undistributed income of the trust in suit was not income 'to be distributed currently' by the fiduciaries to petitioner as beneficiary, within the meaning of Section 162(b). This, for the reason that, by the terms of the trust instrument, the trustees could not distribute trust income to petitioner except upon his request, and were obliged to accumulate and add to trust corpus all undistributed net income at the end of each year. The trustees were bound to abide by the exact terms and conditions of the trust instrument. By its terms, trust income was not distributable to petitioner unless he elected to withdraw it by requesting that it be paid to him."

The words "to be distributed currently" presuppose a *periodic duty* on the part of the trustee. *Commissioner of Internal Revenue* v. *First Trust & Deposit Co.*, 118 F. 2d 449, 452; and *Commissioner of Internal Revenue* v. *Stearns*, 65 F. 2d 371, 373, certiorari denied 290 U. S. 670.

The words "to be distributed currently" must be construed to mean income which by direction of the trust instrument *must* be paid or credited periodically to the beneficiaries. *Plimpton* v. *Commissioner of Internal Revenue*, 135 F. 2d 482, 486.

> "In each of these Acts * * * the intent is that annual income to a particular beneficiary from a trust estate shall be taxed to him as a separate unit of taxation where that income is 'distributed' to him. 'Distribution' as there used does not necessarily mean passing into the uncontrolled possession and disposition of the beneficiary. *It means separation and segregation from the trust estate so that it no longer forms any part or parcel thereof. The test set up by the stat-*

ute is whether the income passes from the trust estate which produced it and ceases to be subject to the terms and control of that trust." (Emphasis supplied) *Willcuts* v. *Ordway,* 19 F. 2d 917, 918 (1927).

The statutes referred to in *Willcuts* v. *Ordway,* just cited, are the Revenue Acts of 1916, 1918, and 1921. Each of those statutes uses the words "*to be distributed*", *and it is to these words that the decision in Willcuts* v. *Ordway refers.* That case has never been overruled or questioned. It was decided in 1927. The statutory language has nevertheless been continued in the subsequent enactments, presumably in agreement with such interpretation. To the same effect, see *Commissioner of Internal Revenue* v. *Plant,* 76 F. 2d 8, 9. That the fiduciary must be "*under a duty currently to distribute,*" see *Freuler* v. *Helvering,* 291 U. S. 35, 41, and see also *Mary Pyne Filley,* 45 B. T. A. 826, 830.

Nature of power held by petitioner under laws of Missouri.—It is true that petitioner was given a power to direct the current income during a particular year from accumulation and require its payment to himself. It is the duty of the trustees to comply with that request. The legal result is precisely the same as if the grantor had said: My son may (shall have power to, if he sees fit) demand of the trustees the payment of income before its accumulation into principal before the end of the current year. Whatever rights petitioner acquired under the trust were obtained according to the rule of the laws of Missouri. *Helvering* v. *Stuart,* 317 U. S. 154, 161.

No particular form of words is necessary to create a power. 49 *Corpus Juris,* p. 1253; *Turner* v. *Timberlake,* 53 Mo. 371; *In re McKallip's Estate,* 324 Pa. 438, 188 Atl. 343, 345; see, especially, *Gilman* v. *Bell,* 99 Ill. 144, 150; *In re Hart's Estate,* 30 N. Y. S. 2d 147, 148; and *Appeal of Elizabeth S. Sprague,* 8 B. T. A. 173, 179-180.

"A power is wholly ineffective until it is exercised; and other rights and interests in the subject-matter of a power are not affected by its mere existence and may rest or take effect, subject to the power, even though liable to destruction or divestment upon its execution." *Citizen's Bank of Lancaster* v. *Foglesang*, 326 Mo. 581, 31 S.W. 2d, 778, 782.

A power is no interest in the subject-matter of the power. *United States* v. *Field*, 255 U. S. 257; *Helvering* v. *Safe Deposit & Trust Co.*, 121 F. 2d 307; *Carver* v. *Jackson*, 4 Pet. 1, 93; *In re Armstrong; Ex parte Gilchrist*, 55 Law Journal Rep., Q.B. 578, 579; 17 Q.B.D. 521; and *Rhode Island Hospital Trust Co.* v. *Anthony*, 49 R.I. 339, 343, 142 Atl. 531, 533.

Rights obtained by a petitioner under local laws of Missouri are subject to the Federal definition of taxability. The Federal Revenue Acts must designate what interests, or rights, so created, shall be taxed if any tax is to apply. The Congress has not fixed a tax on such a possibility of receiving income, to be determined under the laws of Missouri, as petitioner had in the pending case. *Helvering* v. *Stuart*, supra, 162.

Trust estate here not entitled to any deduction.—In a situation where the income "is to be distributed currently," and only in such situation, is the trustee entitled to a *deduction.* (Section 162(b)). Both the Tax Court and the Circuit Court of Appeals found that the trust income was *not* "to be distributed currently" so as to entitle the trust estate to a deduction under Section 162(b).

Deductions are *privileges* and are narrowly construed. 1 *Mertens on Income Taxation*, Sec. 3.08; *White* v. *United States*, 305 U. S. 281, 292; *Interstate Transit Lines* v. *Commissioner of Internal Revenue*, 319 U. S. 590, 593; *Hales-Mullally, Inc.* v. *Commissioner of Internal Revenue*, 131 F.

2d 509, 511; *Langford Investment Co.* v. *Commissioner of Internal Revenue*, 77 F. 2d 468, 472.

If it be possible any longer to rely on statutory language, *the trustees are not entitled to any deduction for income which they are not required, and have no power, to distribute to a beneficiary.* Certainly the right to deduct is not clear or plain.

It is the settled doctrine of the Federal Courts that taxing statutes, in case of doubt, must be construed in favor of the citizen. The Government is bound by the letter. *Crooks* v. *Harrelson*, 282 U. S. 55, 61; *United States* v. *Merriam*, 263 U. S. 179, 187-188; *Gould* v. *Gould*, 245 U. S. 151, 153; *Benziger* v. *United States*, 192 U. S. 38, 55; *Hecht* v. *Malley*, 265 U. S. 144, 156; and *White* v. *Aronson*, 302 U. S. 16, 20.

Injustice resulting from decision below.—The Circuit Court of Appeals held the undistributed income from the trust estate taxable to petitioner under Section 22(a) by resorting to "implications" deducible from prior decisions which dealt with colorable trusts. In so doing the Court ignored the fact that there was created here a *real*, as distinguished from a merely *colorable, trust.* At the time of its creation, the grantor was engaged in the erection of a very large commercial building, involving many collateral obligations. Until these obligations were satisfied, there was to be no available income. The grantor was approaching the close of his life. What might happen in the course of an involved situation was unknowable. *It was not until fifteen years later that these prior obligations were so far satisfied as to permit the accrual of income for any other purpose.* To say that the instrument in question did not *originally* create an *actual* trust is an incredible suggestion. For the Commissioner of Internal Revenue, *at his election*, to say, in effect, that this integral instrument and transac-

tion *ceased to be a trust*, when it began to produce income, not required for the payment of debts, seems to us equally astonishing.

There being a *trust*, until its income has been, pursuant to the condition precedent of a demand, diverted from accumulation as directed by the trust and *segregated* from the trust—*until it has ceased to be a part of the moneys subject to the terms of the trust*—under the plain language of the statute, it must be taxed against the trust.

2. In applying Section 22(a) in disregard of the special statutes particularly relating to trusts, the decision below conflicts with principles applied in prior decisions of this Court.—In *Helvering v. Safe Deposit and Trust Co. of Baltimore*, 316 U. S. 56, the Court dealt with a bona fide actual trust. It held that an *unexercised* power of disposition by will on the part of a son beneficiary did not subject his estate to taxes for the property in the trust estate over which he exercised no power of disposition prior to his decease. In that case the Court held that the words "interest * * * of the decedent at the time of his death" in Section 302(a) of the Revenue Act of 1926 were not intended by Congress to include property subject to a general testamentary power *unexercised* by the decedent.

Because a specific statute, Section 302(f) of the Revenue Act of 1926, dealt with the subject of testamentary powers, this Court held that there was no room for the application of Section 302(a), whose provisions might, in the absence of the special statute, have been applied. In so holding this Court recognized the "principle" that the realities of the taxpayer's economic interest, rather than the niceties of the conveyancer's art, should determine the power to tax, but refused to apply the "principle" as a "guide" in the construction of an unambiguous statute.

In the pending case the language of Sections 161 and 162 is clear and unambiguous in its relation to income from a bona fide trust. The trust estate may not claim as a deduction income which is *not* "to be distributed currently by the fiduciary" and which the petitioner herein did not request or receive. When the meaning of a statute is plain, there is no room for interpretation. *Lake County* v. *Rollins*, 130 U. S. 62; *Lewis* v. *United States*, 92 U. S. 618. There was no occasion for the Circuit Court to apply the "principle" announced in the *Clifford* case, where no actual trust existed, as a "guide" in the construction of the unambiguous language of Sections 161 and 162 in the instant case where a real trust is involved, and such application is at variance with the principle applied by this Court in the *Safe Deposit and Trust Co.* case.

In *Helvering* v. *Wood*, 309 U. S. 344, the Court refused to hold the income from a short-term trust taxable to the grantor under Section 166 where no power to revest was held by the grantor. There, this Court gave effect to the language used in Section 166 whereby Congress treated a power to revest or revoke unlike a reversion in a short-term trust. The Court said (p. 347):

> "Congress seems to have drawn §166 with that distinction in mind, for mere reversions are not specifically mentioned. Whether as a matter of policy such nice distinctions should be perpetuated in a tax law by selecting one type of trust but not the other for special treatment is not for us. *We have only the responsibility of carrying out the Congressional mandate.* And where Congress has drawn a distinction, however nice, it is not for us to obliterate it. That seems to be the case here. Whether wisely or not, Congress confined §166 to trusts where there was a 'power to revest.' *The problem of interpretation under §166 is therefore quite different from that under §22(a).* The former is narrowly confined to a special

> class; the latter by broad sweeping language is all inclusive. *Helvering* v. *Clifford, supra.* Accordingly, the wide range for definition and specification under the latter is lacking under §166. *And so far as §166 is concerned no apparent or lurking ambiguity requires or permits us to divine a broader purpose than that expressed.*" (Emphasis supplied.)

Under the trust here in question the undistributed income not requested by petitioner is directed by the trust instrument to be added to the corpus. This undistributed income is "income accumulated or held for future distribution under the terms of the will or trust" within the unambiguous language of Section 161. No deduction for such undistributed income is allowed the trust estate under Section 162(b). Therefore, the undistributed income is taxable to the trust estate, and not to petitioner, under the plain language of Sections 161 and 162, in which "no apparent or lurking ambiguity requires or permits us [the Court] to divine a broader purpose than that expressed." To construe Section 22(a) as justifying taxation of the undistributed income to petitioner in this case is to emasculate and refuse to give effect to the unambiguous provisions of Sections 161 and 162 and "to write into the statute what is not there and what Congress has omitted to place there." This, the Court refused to do in *Helvering* v. *Wood, supra.*

The holdings of the Tax Court and the Circuit Court in this case are in direct conflict with the prior holding of the Board of Tax Appeals in *Appeal of Elizabeth S. Sprague*, 8 B. T. A. 173. In that case, among other things, the Board said (pp. 179-180):

> "The Commissioner held that because the petitioner could receive the income of the trust funds by making a written request therefor, the entire income is taxable to her, and determined the deficiency accordingly.

This position can not be sustained. The trust instruments all provided that the income should be added to the principal. To this extent such income was accumulated for unascertained persons or persons with contingent interests. There was the further provision that upon written request (by the settlor in one case and by the petitioner in the others) certain portions of the income were to be paid to the petitioner. Any such request constituted the exercise of a power which, to the extent that such power was validly exercised, removed such income from the provision for accumulation and made it distributable. Such distributable income was thereupon severed from the trust property and was taxable to the beneficiary under the provisions of section 219, quoted above. So much as was not distributable pursuant to the exercise of the power given by the trust instrument, remained a portion of the trust property, taxable to the fiduciary."

3. Necessity exists for clarification by this Court of "implications deducible" from prior decisions of Helvering v. Clifford, 309 U. S. 331, and Corliss v. Bowers, 281 U. S. 376.—

(a) *Analysis of issues involved and language used.*—In the *Clifford* case this Court applied the principle, that the realities of the taxpayer's economic interest should determine the power to tax, as a "guide to statutory interpretation," where the language of a statute and its statutory history did not afford more specific indications of the legislative intent. There, only a *colorable* trust had been created and this Court held that the income from that trust belonged to the grantor, who had never parted with dominion, and was therefore properly taxable to him under Section 22(a).

The Circuit Court of Appeals for the Eighth Circuit has misunderstood and misapplied the cases of *Helvering*

v. *Clifford*, 309 U. S. 331, and *Corliss* v. *Bowers*, 281 U. S. 376.

Neither those cases, nor any other cases ever decided by the Supreme Court of the United States, hold that the income of a *real* trust (as distinguished from a merely *colorable* trust), that is *not to be distributed currently by the fiduciary to the beneficiaries*, can be taxed to beneficiaries, who were not the creators of the trust.

The Supreme Court could not so hold, without *judicially* repealing the *particular* and *special* provisions of Sections 161 and 162 of the Revenue Acts of 1934 and 1936, providing for the taxation of *trusts*.

The Supreme Court itself has pointed out, in a recent case, the meaning of both the *Corliss* and the *Clifford* cases. Interpreting the case of *Corliss* v. *Bowers*, the Supreme Court has said:

> "In Corliss v. Bowers * * * he (the taxpayer) had disposed of the res but with a power to revoke at any moment. This right to realize income by revocation at the *settlor's* option *overcame the technical disposition.*" (Emphasis supplied.) *Helvering* v. *Stuart*, 317 U. S. 154, 168.

In other words, in the *Corliss* case there was no *real* or *actual* trust, because there had never been any *real* or *actual* transfer of the res.

Interpreting the case of *Helvering* v. *Clifford*, 309 U. S. 331, the Supreme Court has said:

> "The Commissioner, however, raised in the Court of Appeals and has pressed here the liability of the *donors* for taxation under Section 22(a) * * * on the ground that the trust incomes are chargeable to the donors under the rule of *Helvering* v. *Clifford*, 309 U. S. 331. *That is, whether after the establishment of the trust* the GRANTOR may STILL BE TREATED AS THE OWNER OF THE CORPUS *and* THEREFORE *taxable on its*

income." (Emphasis supplied.) *Helvering* v. *Stuart*, 317 U. S. 154, 167.

In the case of *Corliss* v. *Bowers, supra,* the grantor had reserved the power to modify, or alter in any manner, or to abolish the trust at will. The case fell squarely within Section 219(g) of the Revenue Act of 1924, which provided that "where the *grantor* of a trust has, at any time during the taxable year * * * the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

In that case, Mr. Justice Holmes uttered his frequently and loosely quoted *dictum* that "The income that is subject to a man's *unfettered* command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not." (Emphasis supplied.) The argument advanced by the Solicitor General in that case was that Congress did not exceed its power in holding the grantor accountable. It seems plain that Mr. Justice Holmes was justifying the *statutory provision.* He had no *right* to go further; and when he said "may be taxed" he meant "*may be taxed, as here, by statute.*" Yet this sweeping phrase has frequently been cited and relied upon as fully inclusive of the doctrine of so-called "economic equivalence."

As to the *Clifford* case, but two questions appear there to have been presented. There the Commissioner (petitioner) asserted, first, that the *grantor remained,* in substance, the owner of the trust *res*, and its income was therefore taxable to him under Section 22(a) of the Revenue Act of 1934; and, second, that the income was properly taxable to *grantor* (under Section 166 of that Act) as the income of a revocable trust. The *second* assertion was unnecessary to decide; but the Court *did* decide, merely

that the grantor *continued to be the owner of the trust property and was therefore taxable on its income under Section 22(a).* That is all that was decided in the *Clifford* case.

(b) *Erroneous basis of decision of instant case by Tax Court.*—The majority of the Tax Court recognized in its opinion that (R. 89-90):

> "From the language of sections 161, 162, 166 and 167, *supra*, it would seem that they supply a complete, ultimate and exclusive plan or method whereunder and whereby the income of estates and trusts is taxed, in that the income is, under section 161, taxed to the trust and to the trust alone, except where distributed or distributable to beneficiaries it is, under section 162, taxed to them, or, in the instances prescribed in sections 166 and 167, it is taxed to the grantor. Our attention has been called to no exception specifically expressed in the statute, and we have found none."

but held that, despite unambiguous statutes to the contrary, the Court was compelled by *Corliss* v. *Bowers, supra*, and *Helvering* v. *Clifford, supra*, to rule that the petitioner herein, who was not the grantor of a colorable trust but a beneficiary of a *real* and *actual* trust, must be held to be the owner of and taxable upon undistributed income which he had never received, and which was not required "to be distributed currently by the fiduciary," and which at the end of each current year was converted into principal of the continuing trust. Five judges of the Tax Court dissented on the ground that the two prior decisions of this Court were not applicable to the facts of the pending case.

(c) *Wholly unjustified "implications" deduced by Circuit Court from prior decisions.*—The Circuit Court agreed with the minority opinion of the Tax Court that the undistributed income of the trust in suit was *not* income "to be distributed currently" by the fiduciaries to petitioner as beneficiary within the meaning of Section 162(b) (R. 362),

and had "no quarrel with the views expressed by the minority of the Tax Court relative to the applicability of §161(a)(1)" (R. 362) to wit: that the balance of the net income not so requested was "income accumulated or held for future distribution under the terms of the will or trust" within the meaning of Section 161(a)(1) [therefore, was taxable to the trust]. The Circuit Court said (R. 363):

> "In the absence of the construction and effect which has been accorded to §22(a) by the Supreme Court in *Helvering* v. *Clifford*, *supra*, * * * one could well believe that it was the intent of Congress that a bona fide trust should be a distinct taxable entity and that its undistributable 'fruits' should not be 'attributed to a different tree from that on which they grew'."

but affirmed the majority opinion of the Tax Court upon the reasoning that "implications which fairly may be drawn from the opinions of the Supreme Court in *Corliss* v. *Bowers*, 281 U. S. 376, 378, *Helvering* v. *Clifford*, 309 U. S. 331 * * * justify, if they do not compel, the conclusion that the undistributed net income of the trust in suit * * * was taxable to petitioner under §22(a)" (R. 363). In so holding the Circuit Court overlooked the subsequent interpretation of the *Corliss* and *Clifford* cases by this Court in *Helvering* v. *Stuart*, 317 U. S. 154, 167, 168. Obviously, deducible "implications" from decisions of this Court furnish no basis or legal justification for the obliteration of a specific statutory scheme for the taxation of trust income.

Mere "implications" are inadequate, and may not be used, to guide statutory interpretation in a case like the instant one in which the meaning of the statutes is plainly expressed. In the instant case the Circuit Court erred in resting its decision upon "implications" drawn from the opinions of the Court in *Corliss* v. *Bowers*, 281 U. S. 376, 378, and *Helvering* v. *Clifford*, 309 U. S. 331, because said implications are completely hostile to the express pro-

visions of Sections 161 and 162 of the Revenue Act governing taxation of the income of trusts.

In its opinion the Circuit Court of Appeals referred to *Harrison* v. *Schaffner*, 312 U. S. 579, which involved an *exercised* power over income; and to *Helvering* v. *Gordon*, 87 F. 2d 663, which involved *no trust* of any character, real or colorable, and therefore contained no possibility of the application of *special* and *particular* statutes governing trusts, such as Sections 161 and 162, herein referred to.

(d) *Answer to specific question will eliminate existing uncertainties.*—This Court ought, for the clarification of the law, to decide, authoritatively, a question it has never decided, namely: Whether the undistributed income of a real and actual trust, not required to be distributed currently, can in spite and disregard of the specific provisions of Sections 161 and 162 (governing the taxation of trusts) at the election of the Commissioner of Internal Revenue, be taxed under Section 22(a) to a beneficiary (other than the grantor) who has never demanded or received such income, which passes at the end of each year into the principal of a continuing trust, because an unexercised power to demand and receive such income during the current year has been granted to the beneficiary.

Conclusion

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

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